Chinese Daily News *and* Communications Workers Of America, AFL–CIO, Petitioner. Case 21–RC–20280

June 30, 2005

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held on March 19, 2001, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 78 votes cast for and 63 votes cast against the Petitioner, with 7 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election, and finds that the election must be set aside and a new election held.[1]

I. BACKGROUND

The Petitioner sought to represent a unit of employees at the Employer's Monterey Park, California newspaper operation. The Employer contended that Deputy City Editor Hsiao-Tse Chao, Printing Group Leader Sanh Kien Tran, and Book Department Group Leaders Ching Shan Lin, Hao Liu, and Chi Ping Hu were supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. The Regional Director issued a Decision and Direction of Election on February 16, 2001, finding that these five persons were supervisors and, thus, should be excluded from the petitioned-for unit.[2] Both the Employer and the Petitioner filed requests for review of findings contained in the Regional Director's Decision and Direction of Election. On March 7, 2001, the Board issued an Order denying review but allowing the five alleged supervisors to vote subject to challenge.[3]

After the election, the Employer filed timely objections, alleging, inter alia,[4] that the prounion campaign conduct of the Employer's supervisors[5] tainted the election. The hearing officer recommended overruling the Employer's objections in their entirety, finding that the conduct at issue did not rise to the level of objectionable conduct under existing Board law. Specifically regarding Book Department Group Leader Lin's solicitation of authorization cards, the hearing officer found no objectionable conduct in the absence of evidence of coercive statements, threats, or promises to employees during the prepetition signing of the cards.

II. FACTS

Lin possesses and has exercised authority to interview, select, and hire applicants for employment in the book department. Upper-level managers do not participate in this process and sign off on hiring decisions in reliance on the recommendations of those who do participate. Approximately eight employees report to Lin. The hearing officer found that Lin is a supervisor based on his independent judgment in hiring employees. Additionally, the hearing officer found that Lin has authority to approve employees' leave requests and assign work to employees.[6]

As the hearing officer further found, Lin attended a meeting during the organizing campaign at which the Petitioner distributed authorization cards. After returning from the meeting, Lin and a bargaining unit employee left the book department and went outside the building with the employees whom Lin supervised, at

[1] The Employer filed a posthearing motion, which the Petitioner opposed, to dismiss the petition based on asserted evidence that a majority of the unit employees no longer desire representation by the Petitioner. We deny the Employer's motion because Board law does not allow such evidence to negate the results of a Board-conducted election. *Forest Park Nursing Home*, 235 NLRB 408, 409 (1978), and cases cited therein ("[A]n alleged repudiation by employees of a successful union shortly after the election has long been held insufficient to warrant disturbing the election results.").

[2] The Regional Director also found that Ren Shuin Wing was a statutory supervisor, but the Petitioner did not request review of this finding.

[3] The Regional Director's findings regarding an appropriate unit are not at issue in this proceeding because the Board denied the Employer's request for review of this issue.

[4] Because our decision is based solely on the issue of card solicitation by Book Department Group leader Lin, we find it unnecessary to address the Employer's remaining exceptions regarding other alleged objectionable conduct.

[5] No exceptions were filed to the hearing officer's finding that Book Department Group Leaders Lin, Liu, and Hu were supervisors within the meaning of Sec. 2(11) of the Act. For that reason, we do not review the finding of supervisory status here; rather, we assume the group leaders' supervisory status and limit our analysis to the extent of that authority as found by the hearing officer. Because we only address the Employer's exceptions with respect to Lin's card solicitation, as noted above, we find it unnecessary to reach the Petitioner's exceptions regarding the supervisory status of Deputy City Editor Chao and Printing Group Leader Tran.

[6] Additional evidence indicates that book department group leaders have authority to reward employees by completing performance evaluations that affect their raises and bonuses.

which time authorization cards were distributed to them.[7] Lin personally watched while seven of his supervisees signed cards; he testified that one employee in his department did not sign a card. Lin then collected the signed cards and gave them to the unit employee to return to the Petitioner.

III. DISCUSSION

The Employer argues in its exceptions that the hearing officer erred in finding no objectionable conduct. We agree, based on the Board's recent decision in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004).

Harborside, supra, was on remand from the United States Court of Appeals for the Sixth Circuit. The court criticized the Board for issuing decisions that departed from longstanding Board precedent by purporting to require an explicit threat or promise in order to establish objectionable prounion supervisory conduct.[8] The Board on remand reaffirmed extant Board law that explicit threats and promises are not a required basis for setting aside an election. Consistent with that, the Board disavowed language used in some cases that was inconsistent with that established precedent.[9] The Board took the opportunity to clarify and restate Board law. The Board set forth a two-pronged test, which is largely consistent with historic Board law and which reconciles the manner in which the Board treats both antiunion and prounion activities of supervisors, based on the potential of both types of activities to interfere with employee free choice.[10] The Board explained that the issue of whether prounion supervisory conduct upsets the laboratory conditions necessary for a fair election is determined by two factors:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Id., slip op. at 4.

In addition, the Board reversed prior law concerning the solicitation of union authorization cards by supervisors.[11] Prior Board law held that the solicitation of authorization cards by supervisors is not objectionable where "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation."[12] The *Harborside* Board held that such supervisory solicitations are inherently coercive absent mitigating circumstances.[13] Consistent with the Board's longstanding exception to the *Ideal Electric* rule,[14] the Board further concluded that the effects of this coercion may continue to be felt during the critical period between the filing of the petition and the election, even if the card solicitation occurred prior to the filing of the petition.[15]

We find, based on the nature and extent of Lin's supervisory authority and the nature, extent, and context of his conduct described above, that Lin's solicitation and collection of authorization cards from the book department employees whom he supervised was inherently coercive. There is no evidence of mitigating circumstances to counteract this coercive effect. Moreover, we find that Lin's conduct interfered with employees' freedom of choice to such an extent that it materially affected the outcome of the election.

The Petitioner prevailed in the election by a margin of 15 votes and there were 7 challenged ballots.[16] Under the approach utilized in *Harborside* and the case cited therein,[17] we assume that the 7 challenged voters were eligible to vote, and that they would have voted in favor of the objecting party. That would change the margin of victory to 78–70, and a change in as few as 4 votes would have changed the election result. The Board also followed this approach in such cases as *Virginia Con-*

[7] Although Lin testified that the other bargaining unit employee physically handed out the cards, the hearing officer found that Lin and the unit employee distributed the cards.

[8] *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206 (2000).

[9] *Harborside*, supra, 343 NLRB No. 100, slip op. at 1.

[10] The *Harborside* Board continued to recognize that the antiunion campaign of a prounion supervisor's employer may impact on the effect of prounion supervisory conduct. Id., slip op. at 5, fn. 12.

[11] Id., slip op. at 1.

[12] *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999).

[13] *Harborside*, supra, slip op. at 1.

[14] 134 NLRB 1275 (1961).

[15] *Harborside*, supra, slip op. at 7–8 (citing, inter alia, *Lyon's Restaurant*, 234 NLRB 178 (1978); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973); *Gibson's Discount Center*, 214 NLRB 221 (1974)).

[16] As noted infra, all eight employees supervised by Lin were exposed to his objectionable activities. Therefore, it is conceivable that Lin's objectionable conduct could have altered the election result even without regard to the challenged ballots.

[17] *Harborside*, supra, slip op. at 8, fn. 23 (citing *Acme Bus Corp.*, 316 NLRB 274 (1995)).

crete Corp., 334 NLRB 796 (2001) (citing *Rexall Corp.*, 272 NLRB 316 (1984)), which involved objections other than prounion supervisory conduct.

We recognize that in some cases the Board has remanded the challenges for a determination of eligibility.[18] We further recognize that the *Fessler-Buedel* approach could lead to a more certain mathematical result. Under that approach, we start with the assumption that the eight employees exposed to improper interference voted "yes" and would have voted "no" absent the interference. That would change the election result to 70–71. A remand would determine eligibility of the 7 challenged employees and could alter the result.[19]

However, a remand does not represent the Board's usual practice and we decline to follow that remand approach here. We believe it would be particularly inappropriate to depart from the Board's usual practice where, as here, this election was held over 4 years ago, and a remand would add more time-consuming litigation to the process. The goals of expediency, conservation of Board resources, and avoidance of piecemeal adjudication, as our dissenting colleague acknowledges, clearly argue against remand here. Therefore, we adhere to the procedure followed in *Harborside* (which involved similar objections) and the cases cited above, and we decline to reconcile the divergent line of authority at this time, particularly in the absence of a three-Member Board majority to overrule extant Board precedent.

In all the circumstances, we are persuaded that there is a substantial basis for believing that the laboratory conditions were tainted by supervisory conduct.

Objections must be carefully scrutinized in close elections. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122 (6th Cir. 1992). As the Board explained in *Harborside*, "the Union cards can 'paint a false portrait of employee support during its election campaign.'"[20] Given that all eight employees directly supervised by Lin were exposed to his card solicitation activities, and seven signed cards in his presence, we find that this conduct materially affected the outcome of the election. Accordingly, we reverse the hearing officer's recommendation to overrule the Employer's objections, and we direct a second election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Communications Workers of America, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

[18] See, e.g., *Fessler & Bowman, Inc*., 341 NLRB No. 122, slip op. at 4 (2004); *Buedel Food Products Co*., 300 NLRB 638 (1990).

[19] It is likely that one or more of the three persons found to be supervisors (to which no party has excepted) are challenged voters. Moreover, if these 3 challenges are sustained, at least 3 of the remaining 4 overruled challenged ballots would have to be "yes" votes to change the result (from 70–71 to 73–72).

[20] *Harborside*, supra, slip op. at 7 (quoting *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277 (1973)).

grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Regrettably, this representation election case has been at the Board for almost 4 years. During that time, the Board has reversed its approach to the solicitation of union authorization cards by supervisors[1] and has decided to apply its new approach retroactively.[2] Accordingly, the majority concludes that the election here must be set aside. I disagree in every respect. As explained in earlier dissents, the Board was wrong to change the law and wrong to apply it retroactively. And while I need not reach the issue, even under the new standard, it is not clear that the election should be set aside, instead of remanding the case so that potentially determinative ballot challenges can be resolved.

The majority relies solely on Book Department Group Leader Lin's solicitation of cards, citing the new standard recently established by *Harborside*, supra. Prior to *Harborside*, the Board treated supervisory solicitation of authorization cards as presumptively lawful, where the employer had clearly communicated an antiunion position and "'nothing in the words, deeds, or atmosphere of a supervisor's request . . . contains the seeds of potential reprisal, punishment, or intimidation.'" *Millsboro Nursing & Rehabilitation Center*, 327 NLRB 879, 880 (1999), quoting *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir. 1980). The *Harborside* Board overturned this principle.

For the reasons stated in the *Harborside* dissent, I would follow the traditional approach and find here that Lin's participation in the solicitation of cards from employees in his department would not reasonably have tended to coerce these employees into voting for the Union. It is clear that the Employer openly opposed the Union. Thus, the employees had little to fear from a prounion supervisor acting, like Lin, in defiance of the Employer and susceptible to lawful discharge. Moreover, no other circumstances made Lin's participation in the solicitation of cards coercive.

Even if Lin's involvement in card solicitation was objectionable, it is doubtful that the election should be set aside, given the Union's margin of victory (78–63) and the existence of 7 challenged ballots (which were never resolved). Consistent with established practice, and to ensure that coercive conduct does not taint the election result here, we must assume that 8 votes—representing the number of employees supervised by Lin who witnessed his card solicitation—should be subtracted from the Union's total and added to the antiunion count. In other words, we conclusively assume that the 8 employees were coerced by Lin's conduct into voting for the Union, instead of voting against it. See, e.g., *Buedel Food Products Co.*, 300 NLRB 638 (1990). This yields a hypothetical tally of 70 votes for the Union and 71 against.

But the 7 challenged ballots remain and, under this scenario, they could be regarded as determinative—a point the majority essentially acknowledges. Rather than remanding the case to resolve the challenges, however, the majority chooses to "*assume* that the 7 challenged voters were eligible to vote, and that they would have voted in favor of the objecting party," i.e., against the Union. The majority recognizes that, while *Harborside* itself took this approach, the Board has sometimes taken a different tack, requiring that challenges actually be resolved, on remand, in order to determine whether the election should be set aside.[3]

There may well be good reasons to follow the majority's approach here, assuming that objectionable conduct did occur. There was no need for the hearing officer to address the challenged ballots originally, because they were not independently determinative. Declining to remand the challenges now avoids piecemeal adjudication, conserving the Board's resources and expediting a final result, an important consideration in representation matters, particularly an old case like this one. On the other hand, the majority's approach potentially sets aside an election where objectionable conduct actually made no difference in the outcome. That result is contrary to the often-cited principle that representation elections should not lightly be set aside.[4]

[1] *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004). Member Walsh and I dissented.

[2] *SNE Enterprises, Inc.*, 344 NLRB No. 81 (2005). I dissented.

[3] See, e.g., *Fessler & Bowman, Inc.*, 341 NLRB No. 122, slip op. at 4 (2004), citing *Buedel Food Products*, supra.

[4] See, e.g., *Delta Brands, Inc.*, 344 NLRB No. 10, slip op. at 2 (2005).

It seems to me that the Board should address the apparent contradiction in its decisions and explain either which approach is correct (and why) or how the two approaches might be reconciled. Because I find nothing objectionable in Lin's participation in the solicitation of cards from employees he supervised, or in any other conduct at issue in this case, I need not decide how the challenged ballots should be handled. I would have overturned the Employer's objections and certified the Union 4 years ago, and I would do so today.

Dated, Washington, D.C. June 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD